

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1352

IN THE
UNITED STATES COURT OF APPEALS

For the Second Circuit

JOHN H. WILSON, JR.,

Petitioner-Appellee

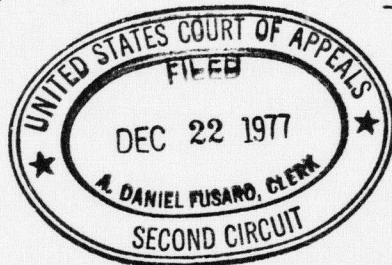
vs.

UNITED STATES OF AMERICA,

Respondent-Appellant

On Appeal From The United States District Court
For The Western District Of New York

BRIEF FOR THE RESPONDENT



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INDEX

Preliminary Statement.....	1
Statute and Rule Involved.....	2
Statement of the Case.....	5
Question Presented.....	8
Point I. Judge Elfvin's decision vacating Wilson's plea should be affirmed.....	8
Conclusion.....	11

TABLE OF CASES

DelVecchio v. United States, 556 F2d 106 (2nd Cir. 1977).....	8,9
Ferguson v. United States, 513 F2d 1011 (2nd Cir. 1975).....	8

STATUTES

Title 21, United States Code, Section 841(a)(1).....	1,2
Title 28, United States Code, Section 2255.....	2

RULES

Rule 11 of the Federal Rules of Criminal Procedure...	3,11
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BRIEF FOR THE RESPONDENT

Preliminary Statement

On November 24, 1975, the defendant pleaded guilty to possession of heroin with intent to distribute in violation of Title 21, United States Code, Section 841(a)(1).

Two days later, he was sentenced to five years imprisonment to be followed by a mandatory special parole term of six years. No appeal was taken from the conviction or sentence.

On March 29, 1977 Wilson filed a motion under Title 28, United States Code, Section 2255, to set aside his conviction alleging that the "court failed to explain to the petitioner the consequences of his guilty plea as it pertained to special parole". In a decision and order dated August 2, 1977, the Honorable John T. Elfvin granted the motion and set aside the guilty plea.

The Government appeals from this decision and order.

STATUTE AND RULE INVOLVED

Title 21, United States Code, Section 841 provides in pertinent part as follows:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense, a controlled substance; ...

(b) Except as otherwise provided in Section 845 of this title, any person who violated subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in Schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than \$25,000, or both... Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment...

(c) A special parole term imposed under this section or Section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or Section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

When Wilson pled guilty on November 24, 1975, Rule 11 of the Federal Rules of Criminal Procedure provided in part as follows:

...The court may refuse to accept a plea of guilty, ...without first addressing the defendant personally and determining that the plea is made voluntarily and understanding of the nature of the charge and the consequences of the plea.

Rule 11 had been changed substantially and effective December 1, 1975, seven days following Wilson's plea, the

pertinent part of the Rule read as follows:

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

STATEMENT OF THE CASE

Wilson was indicted on July 30, 1975 by a Federal Grand Jury charging one count of heroin possession with intent to distribute. After three days of trial, a mistrial was declared and on September 23, 1975 the defendant pled guilty to the charge. (App.9-23) It was agreed that the United States Attorney's Office would recommend to the Court that the defendant receive a term of incarceration not to exceed five years. (App.20,21)¹

At the time of sentence, on October 20, 1975, Judge Elfvin refused to accept the plea because of the statements

1 Wilson was also indicted in State Court and a "package" plea had been arranged by counsel on both Federal and State charges. It was necessary to dispose of the Federal case first before pleading on the State charge.

that Wilson had made to the Probation Officer, and the matter was then set for trial. On November 24, 1975, the defendant Wilson pled guilty to the Indictment, and the Court was satisfied to accept the plea and the defendant was sentenced on November 26, 1975 to the recommended five years imprisonment to be followed by a special parole term of six years.

On November 24, 1975, at the time of plea acceptance, Judge Elfvin advised the defendant as follows:

"The Court: Now, you know from when you were before me earlier that if you are pleading not guilty, which you currently are, you put the Government to its proof. The Government would have to put witnesses on the stand who would have to convince a jury -- and in the selection of which your attorney would participate -- would have to convince that jury beyond a reasonable doubt as to each element of the crime before you could be found guilty, before you could be convicted, you understand that?

Defendant: Yes, sir.

The Court: And these witnesses in taking the stand would have to be here in the courtroom where you could look at them and they could look at you, and you would be able to confront them. You understand that if you plea guilty you are foregoing that right?

Defendant: Yes, I understand.

The Court: Your attorney would be able to cross examine these witnesses and would be able perhaps to break down their testimony so that the whole truth of the matter would be put before the jury and, again, you would be foregoing that right.

Defendant: Yes, sir, I understand that." (App.50,51)

Wilson was not advised by the Court of the maximum penalty nor was the special parole term explained. Defendant appealed neither the conviction nor the sentence, but did request sentence modification on February 11, 1976. Said request was denied.

On March 7, 1977, Wilson filed a "Petition for Appropriate Relief" on the grounds that the Court, at the time it accepted the guilty plea on November 26, 1975 did not explain the special parole consequences.

Judge Elfvin's decision dated August 2, 1977 granted Wilson's petition and vacated the guilty plea on the grounds that he, on November 24, 1975, was not informed of the special parole term. (App.96,97)

QUESTION PRESENTED

SHOULD THE COURT COMPLY WITH THE REQUIREMENTS OF RULE 11 AND ADVISE DEFENDANT OF CONSEQUENCES OF HIS GUILTY PLEA WHEN TWO MONTHS EARLIER, AT THE TIME OF FIRST PLEA, DEFENDANT HAD BEEN CORRECTLY ADVISED.

POINT I

Judge Elfvin's decision vacating Wilson's plea should be affirmed.

Judge Elfvin's decision dated August 2, 1977 vacated Wilson's plea on the grounds that he was not fully advised of the "consequences" of such plea on November 24, 1975. He was not told that the maximum sentence was fifteen years imprisonment nor was he informed of any detail regarding the special parole term. Under Ferguson v. United States, 513 F2d 1011 (2nd Cir. 1975), Judge Elfvin correctly ordered that the plea be vacated.

The Government, in its brief argues that Wilson was informed of the details of his plea, including maximum sentence and mandatory special parole term on September 23, 1975. The Government then cites DelVecchio v. United States, 556 F2d 106 (2nd Cir. 1977), as controlling.

However, Judge Elfvin, on October 20, after reviewing defendant's probation report and the statements made to the Probation Officer refused to accept the plea and

reinstated defendant's plea of not-guilty. The Government makes no reference to this procedure in its brief and simply relies on the record of the original plea discussions of September 23rd. The Government apparently assumes Wilson, on November 24th, 1975, distinctly recalled the earlier discussion and admonitions of September 23rd.

After defendant's not guilty plea was reinstated, the matter was then returned to trial status. Defendant had the choice of proceeding with trial or entertaining renewed plea attempts . The matter had been returned to its original status and the defendant had the option of which road he would travel. On the advice of counsel, Wilson opted for a plea and after much discussion, as reflected by the record, such plea was finally accepted on November 24th. It is clear from the record, that on such date the Court did not meet the requirements of Rule 11 then in effect or of the revised Rule to be effective seven days hence. This oversight was recognized by Judge Elfvin in his decision.

Had Wilson's plea been accepted originally, it would be an exercise of sophistry to argue against the Government's position under this Court's decision in DelVecchio.

Proper administration of justice and correct adherence to the requirements of Rule 11 mandate that Wilson or any other defendant be fully and properly advised of the "consequences" of a guilty plea.

It is presumptuous to assume that the discussion two months earlier remained fixed in defendant's mind when he re-pled on November 24th. The better rule, therefore, is to require full compliance with Rule 11 at the time of plea, regardless of when it occurs, rather than hazard argument over the degree of elapsed time between pleas.

Judge Elfvin's decision should therefore be affirmed.

CONCLUSION

The order of the District Court vacating defendant's plea of guilty entered on November 24th, 1975 should be affirmed and the case ordered to proceed to trial forthwith.

Respectfully submitted,

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FOR THE SECOND CIRCUIT

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Respondent-Appellant

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF ERIE : SS:
CITY OF BUFFALO)

FRANCINE REYNOLDS, being duly sworn, deposes and says:
that deponent is not a party to this action and is over 18
years of age; that on the 15th day of December, 1977, deponent
served the within Brief for Respondent, upon RICHARD J. ARCAPA,
United States Attorney, Western New York, THEODORE J. BURNS,
Assistant United States Attorney, of counsel, 502 United
States Courthouse, Buffalo, New York, in this action, at the
above address, designated by said attorney for that purpose
by depositing a true copy of same enclosed in a postpaid
properly addressed wrapper, in an official depository under the
exclusive care and custody of the United States post office
department within the State of New York.

Sworn to before me this
15th day of December, 1977.

Francine Reynolds

Diane A. Steiner

DIANE A. STEINER
Notary Public, State of New York
Qualified in Erie County
Commission Expires March 30, 1978

